Constitutional Law: The Province and Duty of the Judicial Department: Why the Court Cannot Continue to Use Justiciability to Avoid Dealing with the Tension Between Congress and the President Regarding the War Powers

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COMMENTS

Constitutional Law: The Province and Duty of the Judicial Department: Why the Court Cannot Continue to Use Justiciability to Avoid Dealing with the Tension Between Congress and the President Regarding the War Powers

Article I: "The Congress shall have Power . . . To declare War."
—U.S. Constitution, Article I, Section 8

Article II: "The President shall be Commander in Chief of the Army and Navy."
—U.S. Constitution, Article II, Section 2

Article III: "It is emphatically the province and duty of the judicial department to say what the law is."
—Marbury v. Madison, 5 U.S. 137 (1803)

I. Introduction

The United States is facing a war. This war will not be fought on a field of battle, but in our nation’s capital. It is about who holds the power to commit this nation to military action: Congress or the President. The U.S. Constitution clearly gives the power to declare war to Congress. It also, just as clearly, gives the President the title of Commander in Chief, with all attendant powers. We are a government of laws defined by three definite governmental components with a belief in checks and balances. The issue of who holds the war powers tests that principle. Our system of checks and balances allows for the tension between the legislative and executive branches to be decided by the third co-equal branch of our government, the judiciary.

3. The Federalist No. 48 (James Madison); see also The Federalist No. 9, at 72-73 (Alexander Hamilton) (Clinton Rossiter ed., 1961); The Federalist No. 66, at 401-02 (Alexander Hamilton) (Clinton Rossiter ed., 1961); The Federalist No. 73, at 442 (Alexander Hamilton) (Clinton Rossiter ed., 1961); The Federalist No. 76, at 457 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

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The Supreme Court has not yet cast that deciding vote because the Court has deemed the cases dealing with the war powers that have thus far come before it as nonjusticiable.\(^5\) If there is no justiciable case allowing the judiciary to decide this issue, there is no way for Congress to prevent the President from usurping its power to declare war. If there is no justiciable case, the country’s most serious decision, a decision that possibly affects the lives of every man, woman, and child in the United States and elsewhere, essentially rests with one person, shattering our very concept of limited government.\(^6\)

The Constitution is an amazingly concise document of roughly 6000 words, which indicates that the powers delegated therein are fundamental. The framers recognized the danger of instilling the awesome power of declaring war in a single individual, while simultaneously recognizing the impracticality of leaving command of the armed forces to a group of individuals.\(^7\) Over the years, the security from a war-hungry dictator gave way to the practicalities of a single military commander, until the nation found itself engaged in a war driven by one man, a war that was not technically a war because Congress did not so declare it — the Vietnam war.\(^8\) Congress tried to ensure that its power would not be usurped in the future by passing the War Powers Resolution of 1973.\(^9\) However, the Resolution merely intensified the debate over who holds the power to declare war while solving nothing.

The Supreme Court’s resolution of the tension between the legislative and executive branches regarding the war powers will likely be in a case predicated on a president’s violation of the War Powers Resolution. In deciding the constitutionality of the Resolution, the Court would essentially be defining Congress’ power to declare war. If the Court finds that the Resolution is a constitutional delineation of Congress’ power, it will implicitly adopt the Resolution’s rules as the constitutional definition of war. On the other hand, the Court may find that the Resolution is an unconstitutional overstepping by Congress into the President’s powers as Commander in Chief, implicitly defining war as something greater than that described in the Resolution.

Thus, the fundamental issue in this debate is the constitutionality of the War Powers Resolution. Every President since the passage of the Resolution,  

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5. These cases are discussed \textit{infra} Part V.  
8. The Vietnam War’s role in the birth of the War Powers Resolution is discussed \textit{infra} Part III.  
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"both liberals and conservatives, whether Republican or Democrat, have all attacked" the War Powers Resolution.\textsuperscript{10} Even some members of Congress have challenged its constitutionality.\textsuperscript{11} However, Congress as a whole has maintained and defended the constitutionality of the Resolution.\textsuperscript{12} Despite attempts to repeal it, the Resolution still stands.\textsuperscript{13} The issue ultimately will need to be decided by the judiciary. Indeed, it is the judiciary's duty to do so.\textsuperscript{14} Such faith in our judicial system as the final arbiter of constitutional dilemmas is vested in our judiciary.\textsuperscript{15} Of course, potential court intervention raises additional issues: Even if the Court can, should it make this decision?\textsuperscript{16} And more fundamentally, who, if anyone, has standing to sue a President for violation of the War Powers Resolution?

This comment attempts to answer each of the foregoing questions to provide clarity to these troubling issues. Part II details the recent events that have led to speculation that the case that finally resolves the tension over the war powers may not be long in coming. Part III explains the background of the War Powers Resolution, including why it was written, which Presidents have followed it, which have not, and what it requires. Part IV explains the constitutional doctrine of standing, including the reasons for the standing analysis and a description of its requirements. Part V explores the pool of potential plaintiffs under the War Powers Resolution and predicts whether the Court would likely find standing for each of them. Part VI explores whether the Court might continue to avoid a definitive ruling on the Resolution by labeling the issue a nonjusticiable political question. Part VII offers several conclusions: a suit against a President for violating the War Powers Resolution would probably not be deemed nonjusticiable under the political question doctrine. However, if the suit were brought by an individual member of Congress, it probably would be considered nonjusticiable because of the member's lack of standing. Conversely, the suit probably would be considered justiciable if it were brought by a majority of Congress suing...
jointly; a personally injured member of the public, or military personnel, because these three groups would have standing to sue the President for violating the War Powers Resolution. Therefore, it is possible, and in fact probable, that a case will arise requiring the Court to finally settle the tension between Congress and the President regarding the war powers.

II. The Recent Debate

On August 26, 2002, President George W. Bush's senior officials announced that the President's lawyers had advised him that he did not need to seek congressional approval before launching a military attack against Iraqi president Saddam Hussein,\(^1\) despite the requirements of the Constitution\(^2\) and the War Powers Resolution of 1973.\(^3\) This conclusion was based partly on the President's constitutional role as Commander in Chief and partly on the theory that the President may act pursuant to the congressional permission given in 1991 to Bush's father, the former President, to fight Saddam Hussein in the Persian Gulf War.\(^4\)

This announcement sparked a nationwide debate on the legal and practical ramifications of any military action taken by the President without congressional support.\(^5\) As one administration official observed, "The legal question and the practical question may be very different. There is a view that while there is not a legal necessity to seek anything further, as a matter of statesmanship and politics and practicality, it's necessary — or at a minimum advisable — to do it."\(^6\) Yale International Law Professor Harold Hongju Koh reiterated this view, saying, "[T]his argument may permit them to get into the war, but it won't give them the political support at home and abroad to sustain that effort."\(^7\) Indeed, a number of lawmakers expressed the view that regardless of the legal requirements, President Bush should "seek Congress' approval . . . because it's the right thing to do."\(^8\)

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18. U.S. CONST. art. I, § 8, cl. 11 (giving Congress the power to declare war).
21. See Judy Keen & William M. Welch, *Bush Takes Control of Debate on Iraq*, USA TODAY, Sept. 5, 2002, at A7 ("For the past month, it has sometimes seemed that everyone but President Bush was talking about Iraq . . . [D]ebate over the wisdom of going to war to topple Saddam Hussein raged in newspapers and on TV talk shows. Members of Congress, including Republicans, expressed qualms.").
23. Id.
Practicalities aside, many commentators contended that President Bush was legally bound to ask Congress’ permission pursuant to both Congress’ constitutional power to declare war and the War Powers Resolution of 1973. The former Chairman of the Senate Judiciary Committee, Patrick Leahy, stated that “the administration should not expect to commit American troops to war with a wink and a nod to Congress. There should be a full debate and a vote. That is what the Constitution prescribes, and that is what the American people expect.”25 Both Republican and Democratic congressional leaders agreed with Leahy’s view.26 While President Bush promised to consult Congress before taking any action, he steadfastly maintained that he did not need to ask for permission.27 Maintaining that no congressional resolution was necessary, one senior official candidly asserted, “[W]e don’t want, in getting a resolution, to have conceded that one was constitutionally necessary.”28 However, on September 5, 2002, President Bush announced that he would seek congressional approval before taking military action.29 His announcement “was applauded by those who have griped that he seemed ready to go to war without acknowledging Congress’ constitutional role in deployment of U.S. troops.”30 Subsequently, Congress voted overwhelmingly31 to give President Bush that approval on October 11, 2002, authorizing the President to take military action to remove Saddam Hussein from power.32

However, this vote settled the debate only temporarily. Following President Bush’s State of the Union address on January 28, 2003, Senator Edward Kennedy made a statement that rekindled the debate.33 He pointed out that


27. McQuillan, supra note 26, at A2.


29. Keen & Welch, supra note 21, at A7.

30. Id.


32. H.R.J. Res. 114, 107th Cong. (2002) (enacted); see also Raum, supra note 26 (reporting on the resolutions and the surrounding debate); VandeHei & Eilperin, supra note 31, at A1 (discussing the passage of the resolutions, including numerous quotes from members of Congress both for and against the resolutions).

33. Reaction of Senator Edward M. Kennedy to President Bush’s State of the Union
circumstances had changed since the October 2002 vote, both in Iraq and in other parts of the world, and proposed that there should be another full debate and vote in Congress before war with Iraq.\textsuperscript{34} However, Senate support for such a proposal was weak,\textsuperscript{35} and another vote did not occur before the invasion of Iraq.

A potential plaintiff could very easily use this lack of new approval as a predicate for a claim that the President violated the War Powers Resolution. In fact, two such lawsuits were filed and subsequently dismissed. In \textit{Doe v. Bush},\textsuperscript{36} a number of active-duty military personnel, parents of military personnel, and members of the U.S. House of Representatives sought an injunction to prevent war in Iraq.\textsuperscript{37} The First Circuit dismissed the case, declaring it unripe because Congress had not expressed an objection to war.\textsuperscript{38} In \textit{Callan v. Bush},\textsuperscript{39} a former Congressman claimed the President’s attack on Iraq violated the War Powers Resolution.\textsuperscript{40} The district court dismissed the suit, holding that (1) former Representative Clair Callen did not have standing because he had not been personally injured, and (2) the suit violated the political question doctrine.\textsuperscript{41} These decisions were appealed, but because the fighting in Iraq has ended, the claims are probably moot. Nevertheless, the constitutional questions regarding the power to engage troops remain unresolved, and because of the seemingly perpetual state of countries at war, such questions are certain to be raised again in the future. Indeed, the same questions arose during the presidencies of Gerald Ford, Ronald Reagan, George Bush, and Bill Clinton.\textsuperscript{42} At some point the judiciary needs to address these important unresolved issues.

\textit{III. The War Powers Resolution}

The War Powers Resolution, passed by Congress on November 7, 1973, has the stated purpose

\textit{Address, at} \url{http://www.kennedy.senate.gov/~kennedy/statements/03/01/2003129751.html} (Jan. 28, 2003).

\textsuperscript{34} \textit{Id.}


\textsuperscript{36} 323 F.3d 133 (1st Cir. 2003).

\textsuperscript{37} \textit{Id.} at 134.

\textsuperscript{38} \textit{Id.} at 134-35.

\textsuperscript{39} No. 4:03CV3060 (D. Neb. Apr. 30, 2003) (memorandum and order dismissing case), \textit{available at} \url{http://news.findlaw.com/hdocs/docs/iraq/cllnbsh43003mem.pdf}.

\textsuperscript{40} \textit{Id.} at 1.

\textsuperscript{41} \textit{Id.} at 3-4.

\textsuperscript{42} \textit{Washington Post, War Powers Act Timeline} (2002) (on file with author) [hereinafter \textit{War Powers Act Timeline}]. Each President’s actions are discussed in greater detail \textit{infra} Part III.
to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgement of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.\textsuperscript{43}

The Resolution came as a direct response to the executive branch's abuse of the war powers that led to the Vietnam War.\textsuperscript{44} It was believed that the people wanted Congress to have a say in military action to protect the country from "a President too quick to spill American blood."\textsuperscript{45}

The requirements of the War Powers Resolution are fairly straightforward. The first requirement is that "[t]he President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities."\textsuperscript{46} Second, when there is any introduction of U.S. armed forces into ongoing hostilities, into a situation where circumstances indicate imminent hostilities, or into a foreign country ready for combat, the President has forty-eight hours to submit a written report to Congress.\textsuperscript{47} The writing should contain: "(A) the circumstances necessitating the introduction of United States Armed Forces; (B) the constitutional and legislative authority under which such introduction took place; and (C) the estimated scope and duration of the hostilities or involvement."\textsuperscript{48} The President should provide supplemental reports thereafter no less than once every six months.\textsuperscript{49} The President must withdraw the military forces within sixty calendar days of either submitting a report or engaging in action that should have prompted him to submit a report, unless Congress declares war, otherwise authorizes military action, extends the time limit by sixty days, or is unable to meet because of an attack upon the United States.\textsuperscript{50} If Congress has not authorized military action, but the President takes such action anyway, the President must withdraw the forces if "Congress so directs by concurrent resolution."\textsuperscript{51}


\textsuperscript{45} Rotunda, supra note 10, at 8.

\textsuperscript{46} § 3, 87 Stat. at 555.

\textsuperscript{47} § 4(a), 87 Stat. at 555-56.

\textsuperscript{48} § 4(a)(3), 87 Stat. at 556.

\textsuperscript{49} § 4(c), 87 Stat. at 556.

\textsuperscript{50} § 5(b), 87 Stat. at 556.

\textsuperscript{51} § 5(c), 87 Stat. at 556-67.
Congress based its authority to create the Resolution on Article 1, Section 8, Clause 18 of the Constitution, which reads:

it is specifically provided that the Congress shall have the power to make all laws necessary and proper for carrying into execution, not only its own powers but also all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof.\(^{52}\)

The Resolution is also based on the intent of the framers of the Constitution, who indicated in their comments that they felt that the power to wage war was much too great to leave to the President alone.\(^{53}\) This intent is manifested in the Constitution's unequivocal mandate that "[t]he Congress shall have Power . . . [t]o declare War."\(^{54}\)

Despite its apparent constitutional basis, the War Powers Resolution has consistently been criticized as unconstitutional.\(^{55}\) "Since its enactment, no President has explicitly approved of the War Powers Resolution and all have disputed its constitutionality in light of the Commander in Chief Clause."\(^{56}\) However, the constitutionality of the Resolution has never been judicially tested, in part because of the problem with standing.\(^{57}\) For example, when several congressmen sued President Clinton for violating the War Powers Resolution, the D.C. Circuit Court of Appeals never considered the constitutionality of the Resolution because it found that the congressmen lacked standing, thus preventing the court from addressing any of the arguments raised.\(^{58}\)

Some of the Presidents who have criticized the Resolution have nonetheless complied with it. For example, Gerald Ford called the Resolution

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52. U.S. CONST. art. I, § 8, cl. 18.
54. U.S. CONST. art. I, § 8, cl. 1, 11. It should be noted that there are few enumerated powers in the Constitution, and this is one of them. This indicates just how crucial the framers considered the delegation of the power to declare war to Congress.
55. See Broughton, supra note 12, at 689-90 (noting that the constitutionality of the War Powers Resolution has been criticized by Presidents and by Congressmen); Martin Wald, The Future of the War Powers Resolution, 36 STAN. L. REV. 1407, 1419-20 (1984) (stating that Congress' War Powers Resolution-authorized ability to order the President to withdraw troops from hostilities by concurrent resolution "has been widely criticized as an unconstitutional 'legislative veto'")
56. Broughton, supra note 12, at 689.
57. There are three requirements for standing: (1) injury in fact, (2) causation, and (3) redressability. Allen v. Wright, 468 U.S. 737, 751 (1984). See also infra Part IV for an in-depth discussion of the standing requirements.

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“unconstitutional” and “impractical,” but he still complied by reporting to Congress and by limiting military action against Cambodia in 1975 to stay within the Resolution’s time limit. However, not all Presidents have complied. In fact, “Presidents of both parties have been accused of ignoring the law.” Both Ronald Reagan and George H.W. Bush conducted a number of “quick” wars without congressional approval, claiming that they did not need approval because the hostilities lasted less than sixty days. President Reagan ignored the Resolution in 1982-83 when he deployed U.S. Marines to Beirut, Lebanon, but Congress was reluctant to raise the Resolution issue and speak out against the President’s actions lest the U.S. appear weak. President George H.W. Bush likewise ignored the Resolution during the 1990-91 Persian Gulf War. During Operation Desert Shield, President Bush deployed massive amounts of equipment and troops to Kuwait without consulting Congress. The mobilization was in preparation for substantial military action, thus triggering the War Powers Resolution. However, even as President Bush sought Congress’ approval on January 8, 1991, he continued to maintain that he had authority to act without legislative authorization. In fact, the War Powers Resolution should have been invoked on August 7, 1990, when the U.S. announced its commitment to defend Saudi Arabia if attacked by Iraq. . . . However, Congress could not muster support to challenge the President. When Congress finally voted to authorize the use of force, over 400,000 troops had been deployed and withdrawing any troops would question American credibility around the globe. Therefore, to protect American credibility, Congress was compelled to vote for war.

This after-the-fact congressional authorization quashed any potential lawsuits over the President’s initial disregard of the War Powers Resolution.

60. War Powers Act Timeline, supra note 42.
62. It should be noted that these armed conflicts were not technically wars because Congress has not declared war since World War II. John C. Yoo, War and the Constitutional Text, 69 U. CHI. L. REV. 1639, 1663 (2002).
63. Firmage, supra note 44, at 253-54.
64. Id. at 251-52.
65. Id. at 254-55.
66. Id.
67. Id.
68. Id. at 238 (citations omitted).
69. One such lawsuit had already been filed and dismissed by the D.C. Circuit Court
The issue of the War Powers Resolution next arose on October 25, 1994, when Congress invoked the Resolution after President Bill Clinton deployed forces to Haiti.\footnote{70} Despite this invocation of the Resolution, Congress never asked the President to disengage the forces,\footnote{71} but merely told him to ask first next time.\footnote{72} Furthermore, Congress appropriated funds to finance the conflict.\footnote{73} Nevertheless, this implicit support did not prevent several Congressmen from suing the President for the violation in \textit{Campbell v. Clinton},\footnote{74} although ultimately the District of Columbia Circuit Court of Appeals determined that the Congressmen lacked standing.\footnote{75} 

In summary, Congress essentially intended the War Powers Resolution to be a tool for use in maintaining its constitutional power to declare war, while leaving to the President his constitutional powers as Commander in Chief. However, the Resolution has been continuously criticized as overstepping these bounds and allowing Congress to take constitutional powers from the President. The Resolution has been largely ignored, discounted, and viewed more as an unconstitutional obstacle than a tool for ensuring proper checks and balances in our government. No judicial decision has yet clarified the issue by determining the constitutionality of the Resolution. One major hurdle in obtaining such a decision has been the judicial requirement of standing.

\textbf{IV. Standing}

\textbf{A. Overview}

Standing means that the plaintiff is the right person to raise the particular cause of action.\footnote{76} Put another way, standing determines "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."\footnote{77} If the plaintiff does not have standing, the court cannot hear the

\begin{itemize}
\item because of a lack of ripeness. Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990). This case is discussed in detail \textit{infra} Part V.B.
\item \footnote{72} Howard, \textit{supra} note 70, at 280.
\item \footnote{74} 203 F.3d 19 (D.C. Cir. 2000).
\item \footnote{75} \textit{Id.} at 20. This case is discussed in greater detail \textit{infra} Part V.A.
\item \footnote{76} \textit{ERWIN CHEMERINSKY, CONSTITUTIONAL LAW} 33 (2001) [hereinafter CHEMERINSKY I].
\item \footnote{77} Warth v. Seldin, 422 U.S. 490, 498 (1975).
\end{itemize}
case. Thus, standing must be among the first issues considered by a court. The primary question for standing is "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." 80

The U.S. Supreme Court has identified three constitutional requirements for standing, which may be summed up in one sentence: "A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." 81 The first requirement is injury in fact. 82 The plaintiff must allege that he has suffered an actual injury, or is in imminent harm of suffering an actual injury, and that the injury is not conjectural or hypothetical. 83 The next requirement is causation. 84 The traditional legal test for causation simply asks whether the defendant's conduct caused the plaintiff's injury. 85 The final requirement is redressability. 86 The plaintiff must allege that a finding in the plaintiff's favor will rectify his injury. 87 Simply put, could a court issue a ruling that would

79. At the initial stage of a lawsuit, the court considers issues of justiciability, including ripeness, mootness, political question doctrine, and standing. CHEMERINSKY 1, supra note 76, at 28.
80. Warth, 422 U.S. at 498-99 (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).
81. Allen, 468 U.S. at 751.
82. Warth, 422 U.S. at 501.
83. See United States v. Hays, 515 U.S. 737, 743-44 (1995) (requiring an actual injury for standing); City of Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983) (pointing out that the plaintiff must show that he or she has suffered an actual injury or is in immediate danger of suffering an injury); Warth, 422 U.S. at 501 (holding that a plaintiff "must allege a distinct and palpable injury to himself"); Dellums v. Bush, 752 F. Supp. 1141, 1147 (D.D.C. 1990) (stating that imminent harm is adequate); CHEMERINSKY 1, supra note 76, at 33 (discussing injury requirement).
84. See Allen, 468 U.S. at 753 (holding that an injury is inadequate because it "is not fairly traceable to the assertedly unlawful conduct" of the defendant); Linda R.S. v. Richard D., 410 U.S. 614, 617-18 (1973) (finding that an injury is insufficient when there is not a nexus between it and the defendant's action); CHEMERINSKY 1, supra note 76, at 52 (discussing causation requirement).
85. See sources cited supra note 84.
86. See Allen, 468 U.S. at 752 (holding that "the prospect of obtaining relief from the injury as a result of a favorable ruling" cannot be "too speculative" for there to be standing); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 261-62 (1977) (holding that, in assessing redressability, "a court is not required to engage in undue speculation as a predicate for finding that the plaintiff has the requisite personal stake in the controversy"); it is enough that the injury is likely to be redressed); CHEMERINSKY 1, supra note 76, at 52 (discussing redressability requirement).
87. CHEMERINSKY 1, supra note 76, at 52.
solve the problem? All three requirements must be met for a plaintiff to have standing. These three requirements seem simple and straightforward, yet the Supreme Court has warned that they "cannot be defined so as to make application of the constitutional standing requirement a mechanical exercise." The outward simplicity of these requirements belies the difficult analysis that accompanies each case in which standing is at issue.

In addition to the constitutional requirements for standing, there are two prudential principles. The judiciary has developed these principles for practical reasons, namely to guarantee that the plaintiff has a sufficient interest in the matter and to prevent overload to the judicial system. The first prudential limitation is that a third party usually cannot sue — in other words, the plaintiff must have suffered the injury. If the plaintiff did not suffer the injury, the plaintiff is the wrong person to bring the lawsuit, and thus does not have standing. The second prudential limitation is that a citizen may not sue for a common grievance of all citizens. This is because a generalized grievance is not really an injury. However, at least one constitutional scholar has suggested that these standards are not generally considered constitutional bars, and therefore Congress may statutorily override them. For example, Congress may include in a statute a provision providing a specific cause of action, stipulating that the action may be brought by a third party or by any member of the public, thus allowing a plaintiff standing despite violating a prudential limitation.

The concept of standing is based on the fundamental constitutional principle of the judiciary’s proper role in light of the Constitution’s separation of powers. Standing enhances the separation of powers by restricting the situations in which the judiciary may intervene. However, standing should

88. Allen, 468 U.S. at 751.
89. Id. at 752.
91. Warth, 422 U.S. at 499-500 ("[T]he plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."). There are notable exceptions to this rule. See Craig v. Boren, 429 U.S. 190, 192-97 (1976) (holding that third-party standing is allowed when there is economic injury); Roe v. Wade, 410 U.S. 113, 124-25 (1973) (providing for an exception for situations capable of repetition yet evading review).
92. Warth, 422 U.S. at 499.
93. CHEMERINSKY 1, supra note 76, at 33.
94. Id.
96. CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICY § 2.5.1 (2d ed. 2002) [hereinafter CHEMERINSKY 2].
not be unduly restrictive, damaging the doctrine of separation of powers by eliminating the checks and balances the judiciary provides. This delicate balance is part of what makes standing such an important issue.

Article III of the U.S. Constitution limits federal court jurisdiction to "actual cases or controversies." This limitation is generally called justiciability. In *Flast v. Cohen*, the Supreme Court commented on the cases and controversies restriction, saying, "As is so often the situation in constitutional adjudication, those two words have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government." The justiciability limitation is indeed complex: it includes the concepts of the political question doctrine, mootness, ripeness, and, first and foremost, standing. "[T]he Supreme Court has declared that standing is the most important justiciability requirement."

A multitude of cases have thoroughly analyzed the question of standing, so determining whether a particular plaintiff has standing can often be accomplished by reviewing previous cases with similar allegations. However, simply because a court found one plaintiff to have standing does not mean that it will find an analogous plaintiff to have standing. Subtle differences in not only the plaintiffs and their unique situations, but also in the judges, can have a tremendous effect on the outcome. In fact, some commentators have even suggested that "the Court has manipulated standing rules based on its views of the merits of particular cases." Indeed, Justice Brennan implied as much in his dissent to the Court's decision in *Warth v.*

97. *Id.*
100. *Id.*
101. *Id.* at 94.
102. See *Allen v. Wright*, 468 U.S. 737, 750 (1984) (stating that the most important of the Article III doctrines — standing, mootness, ripeness, and political question — is standing); Ass’n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 171 n.3 (1970) (Brennan, J., concurring in part, dissenting in part) (stating that the elements of justiciability are standing, ripeness, mootness, and political question doctrine); Vander Jagt v. O’Neill, 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (stating that the Article III doctrines are standing, mootness, ripeness, and political question).
103. CHEMERINSKY 1, *supra* note 76, at 32.
105. "Standing frequently has been identified by both justices and commentators as one of the most confused areas of the law... ‘Judicial behavior is erratic, even bizarre.’" CHEMERINSKY 2, *supra* note 96, § 2.5.1, at 60 (quoting JOSEPH Vining, LEGAL IDENTITY 1 (1978)).
106. *Id.*
Seldin, cautioning that "courts cannot refuse to hear a case on the merits merely because they would prefer not to."

Despite its inconsistencies, standing is extremely important to the judicial process. "Standing 'serves, on occasion, as a shorthand expression for all the various elements of justiciability.'" Often, when a plaintiff presents a case that is nonjusticiable for reasons other than standing, the case fails the standing test as well. For instance, if a case is moot, the court may decide that it is not redressable, and thus the plaintiff does not have standing. An example of this would be a situation in which a student sued over a school policy or action, but the student graduated before the case came to trial. The judge may deem the case moot because the issue no longer affects the student, or the judge may decide that the plaintiff lacks standing because the situation is not redressable because any decision of the court would no longer remedy the plaintiff's injury. Likewise, if a case is not ripe, the court may decide that no actual injury exists. For instance, a person could sue for an injury that may occur, but which is not imminent. The court could use either a lack of injury, and thus a lack of standing, or a lack of ripeness to determine that the case is nonjusticiable. Therefore, the standing analysis is usually the first — and sometimes the last — step in a case.

Furthermore, the standing doctrine promotes judicial efficiency in the following ways: (1) it prevents plaintiffs from seeking advisory opinions; (2) it promotes judicial decision making by preventing lawsuits where no real controversy exists and by requiring "an advocate with a sufficient personal concern to effectively litigate the matter;" and (3) it promotes fairness by preventing meddlers from raising the claims of others when they do not want

108. Id. at 520 (Brennan, J., dissenting).
110. The converse is also true. In DeFunis v. Odegard, 416 U.S. 312 (1974), the Court determined that the case was moot because the outcome of the case would not affect the injury. Id. at 317. Thus, both mootness and redressability may be addressed by assessing whether the outcome of the case would affect the injury, and if a particular case is moot, it also lacks standing, and vice versa. See also City of Los Angeles v. Lyons, 461 U.S. 95, 105-10 (1983) (holding that the plaintiff does not present Article III case or controversy because the injury is not likely to happen to him again, then subsequently referring to the lack of jurisdiction as caused by both a lack of redressability and mootness, implying that the two are interchangeable).
112. See Lyons, 461 U.S. at 101-09.
113. See id. at 101-02.
114. Whether a plaintiff has standing "is the threshold question in every federal case, determining the power of the court to entertain the suit." Warth, 422 U.S. at 498.
Moreover, standing prevents courts from addressing questions that they have no right to address — questions best left to the political process. That is why the courts cannot find that a plaintiff has standing merely because no one has a better claim of standing.

The constitutional requirements for standing — injury in fact, causation, and redressability — as well as the prudential limitations on third-party complaints and against generalized grievances are addressed in detail below.

B. Constitutional Requirement 1: Injury In Fact

The first, and arguably most important, requirement for standing is injury. To have standing, a plaintiff must personally have been actually injured. A generalized grievance is insufficient. The injury requirement is crucial to avoid cases where the litigants are not adverse and the court is merely being asked for an advisory opinion. Beyond the general categories of injuries to common law rights, constitutional rights, and statutory rights, no clear guidelines exist as to what is sufficient to constitute an injury for the purposes of the standing requirement. Even within these categories, the Court can be inconsistent. In fact, some constitutional scholars suggest that “a plaintiff has standing if he or she asserts an injury that the Court deems sufficient for standing purposes.” Congress may create a statutory right, the violation of which would presumably be considered an injury, even if it were not an injury in the absence of the statute. However, Justice Scalia has stated that, “[w]hether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch,” indicating that not every violation of

115. CHEMERINSKY 2, supra note 96, § 2.5.1, at 61.
117. Schlesinger, 418 U.S. at 227. “The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.” Id.
119. Id.; see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 573-74 (1992) (holding that a generalized grievance is not an Article III case or controversy); United States v. Richardson, 418 U.S. 166, 173 (1974) (stating that federal court is an inappropriate place to air generalized grievances); CHEMERINSKY 1, supra note 76, at 54 (discussing generalized grievance prohibition).
120. CHEMERINSKY 2, supra note 96, § 2.5.2, at 63.
121. Id. § 2.5.2, at 69.
122. Id. § 2.5.2, at 74.
123. Lujan, 504 U.S. at 580 (Kennedy, J., concurring in part and in the judgment).
a statutory right is a sufficient injury for the purposes of standing.\textsuperscript{124} Furthermore, sometimes the Court considers an injury insufficient for practical reasons, including instances where if one plaintiff is deemed to have standing, millions of others would also have standing.\textsuperscript{125} Such a situation is often better handled through other methods such as legislation.\textsuperscript{126}

One interesting trait of the injury requirement is that sometimes an injury need not have already taken place — an imminent harm may be sufficient in some situations.\textsuperscript{127} The Supreme Court has stated that a"plaintiff does not have to wait for the threatened harm to occur before obtaining standing."\textsuperscript{128} Another interesting attribute is that a noneconomic injury may suffice.\textsuperscript{129} In United States v. Students Challenging Regulatory Agency Procedures (SCRAP),\textsuperscript{130} the plaintiffs’ only injury was to "their use and enjoyment of the natural resources of the Washington area," with no financial or physical injury, yet the Court still found the injury to be sufficient to confer standing.\textsuperscript{131}

An indirect injury may also be sufficient in certain circumstances. In the ordinary case, "[w]hen the suit is one challenging the legality of government action or inaction . . . [and] the plaintiff is himself an object of the action (or forgone action) at issue, . . . . there is ordinarily little question that the action or inaction has caused him injury."\textsuperscript{132} However, the more interesting case is one in which the plaintiff is not the direct object of the government action. In such cases, the Court has held that standing is not precluded merely because the plaintiff’s harm was indirect.\textsuperscript{133} If a restriction imposed on someone other than the plaintiff results in an actual injury to the plaintiff, "the indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights."\textsuperscript{134} The touchstone is that the plaintiff has suffered an injury.

On the other hand, if the plaintiff did not suffer, and will not suffer, an actual injury, the plaintiff does not have standing. In United States v. Hays,\textsuperscript{135} the Supreme Court held that voters did not have standing to sue over a

\begin{itemize}
  \item 124. \textit{Id.} at 576.
  \item 126. \textit{Id.}
  \item 127. See City of Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983) (stating that imminent harm is sufficient for standing, although plaintiff was not in danger of imminent harm).
  \item 130. 412 U.S. 669 (1973).
  \item 131. \textit{Id.} at 686-87.
  \item 133. Warth v. Seldin, 422 U.S. 490, 504-05 (1975).
  \item 134. \textit{Id.} at 505.
  \item 135. 515 U.S. 737 (1995).
\end{itemize}
congressional redistricting scheme that represented racial gerrymandering when the voters did not live in the district that was the focus of the suit.\textsuperscript{136} The Court found that the plaintiffs lacked the requisite injury necessary to convey standing, finding that the plaintiffs were not subjected to the scheme, and thus were not injured.\textsuperscript{137}

The plaintiff’s description of the injury makes a significant difference in the standing analysis, as does the type of relief requested. A plaintiff seeking injunctive relief must show not only that he has personally suffered an injury, but also that there is a likelihood of future harm.\textsuperscript{138} In \textit{City of Los Angeles v. Lyons},\textsuperscript{139} the Supreme Court held that the plaintiff did not have standing to sue over a policy allowing police to use a potentially fatal choke hold in situations not requiring deadly force.\textsuperscript{140} The Court found that although the plaintiff had been subjected to the choke hold in the past, the odds of him being subjected to it again in the future were too slight to represent an injury for the purposes of standing.\textsuperscript{141} The plaintiff had suffered an injury, but that injury was insufficient to convey standing because the plaintiff requested injunctive relief.

The Supreme Court has “repeatedly refused to recognize a generalized grievance against allegedly illegal governmental conduct as [an injury] sufficient for standing to invoke the federal judicial power.”\textsuperscript{142} Such a suit violates both the prudential limitation against generalized grievances, discussed in Part IV.D.2, and the constitutional requirement of actual injury. Thus, knowledge that a law is being violated is by itself not a sufficient injury.\textsuperscript{143} The Supreme Court has clearly stated “that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court.”\textsuperscript{144} An actual injury must be alleged. For example, in \textit{Lujan v. Defenders of Wildlife},\textsuperscript{145} a group of conservationists sued the Secretary of the Interior, claiming that the Endangered Species Act should be applied to more than just federally funded projects.\textsuperscript{146} The injury alleged was that failing to apply the Act to all projects increased the rate of

\begin{itemize}
\item \textsuperscript{136} Id. at 739.
\item \textsuperscript{137} Id. While the voters in the district at issue were subjected to the scheme, and thus were injured, they were not parties to the litigation. Id. at 745.
\item \textsuperscript{138} CHEMERINSKY 2, supra note 96, § 2.5.2, at 66.
\item \textsuperscript{139} 461 U.S. 95 (1983).
\item \textsuperscript{140} Id. at 109.
\item \textsuperscript{141} Id.
\item \textsuperscript{142} Hays, 515 U.S. at 743.
\item \textsuperscript{143} Id. at 745.
\item \textsuperscript{144} Allen v. Wright, 468 U.S. 737, 754 (1984).
\item \textsuperscript{145} 504 U.S. 555 (1992).
\item \textsuperscript{146} Id. at 559.
\end{itemize}
extinction of certain animals.\textsuperscript{147} The Court found this injury insufficient.\textsuperscript{148} In his majority opinion, Justice Scalia pointed out that “[t]his is not a case where plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs,” implying that if the plaintiffs had suffered an actual injury, they would have standing.\textsuperscript{149}

Furthermore, an injury cannot be something invented just go get past the standing analysis. In \textit{United States v. SCRAP}, the Court stated that “pleadings must be something more than an ingenious academic exercise in the conceivable. A plaintiff must allege that he has been or will in fact be perceptibly harmed, . . . not that he can imagine circumstances in which he could be affected.”\textsuperscript{150} In summary, standing requires an actual, concrete injury, or the imminent threat of an actual, concrete injury, that the Court finds sufficient to satisfy the injury requirement.

\textbf{C. Constitutional Requirements 2 & 3: Causation and Redressability}

After meeting the requirement of injury in fact, a plaintiff still must meet the other two constitutional standing requirements: causation and redressability. The causation component of the standing analysis “examines the causal connection between the assertedly unlawful conduct and the alleged injury.”\textsuperscript{151} The redressability component “examines the causal connection between the alleged injury and the judicial relief requested.”\textsuperscript{152} The Court has maintained that these two requirements are distinct, yet they are clearly related.\textsuperscript{153} In fact, they are often treated as one question: “Did the defendant cause the harm such that it can be concluded that limiting the defendant will remedy the injury?”\textsuperscript{154} This question must be answered in the affirmative for a plaintiff to have standing.

Generally, the analysis of causation and redressability is straightforward. For example, in \textit{Linda R.S. v. Richard D.},\textsuperscript{155} the Supreme Court held that the plaintiff did not have standing because there was not “a sufficient nexus between her injury and the government action which she attack[ed] to justify judicial intervention.”\textsuperscript{156} The plaintiff was the mother of an illegitimate child

\textsuperscript{147} Id. at 562.
\textsuperscript{148} Id. at 567.
\textsuperscript{149} Id. at 572.
\textsuperscript{152} Id.
\textsuperscript{153} CHEMERINSKY 1, \textit{supra} note 76, at 52.
\textsuperscript{154} CHEMERINSKY 2, \textit{supra} note 96, §2.5.1, at 58.
\textsuperscript{155} 410 U.S. 614 (1973).
\textsuperscript{156} Id. at 617-18.
whose father was not providing support for the child.\textsuperscript{157} The case concerned the District Attorney's refusal to prosecute the father for nonsupport on the grounds that the child was illegitimate.\textsuperscript{158} The Court did not find that the plaintiff's injury — lack of support from the father — was connected to the government action — failure to prosecute the father.\textsuperscript{159} Thus, there was a lack of causation. Furthermore, prosecution of the father would not necessarily redress the injury. Prosecuting the father would not make him support the child. Thus, the Court held that the mother did not have standing.\textsuperscript{160}

The only time the standards for causation and redressability relax is when a plaintiff sues over a violation of governmental procedure. According to the Court in \textit{Lujan v. Defenders of Wildlife}, "[T]he person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy."\textsuperscript{161} The Court stated that:

one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare [a statutorily mandated] environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.\textsuperscript{162}

Thus, if a statute requires a particular procedure to be followed, and a step which may affect the outcome of the procedure is skipped, a plaintiff should not be denied standing for not being able to show that his injury would have been avoided had the step not been skipped, or that requiring the step would change the outcome and the injury.

Some scholars argue that the causation and redressability requirements are proper because they prevent courts from rendering merely advisory opinions.\textsuperscript{163} If the court cannot fix the harm, it has no business hearing the case. Others argue that causation and redressability are improper because it is unfair to decide them based solely on pleadings.\textsuperscript{164} Justice Stevens has noted that "[t]he purpose of the standing inquiry is to measure the plaintiff's

\textsuperscript{157} \textit{Id.} at 614-15.  
\textsuperscript{158} \textit{Id.}  
\textsuperscript{159} \textit{Id.} at 618.  
\textsuperscript{160} \textit{Id.} at 618-19.  
\textsuperscript{161} \textit{Lujan v. Defenders of Wildlife, 504 U.S. 555, 572 n.7 (1992).}  
\textsuperscript{162} \textit{Id.}  
\textsuperscript{163} CHEMERINSKY 1, \textit{supra} note 76, at 52.  
\textsuperscript{164} \textit{Id.}
stake in the outcome, not whether a court has the authority to provide it with the outcome it seeks.\textsuperscript{165} Regardless of what courts may decide in the future, for now, causation and redressability are constitutionally required elements of standing, and therefore must be considered in any standing analysis.

\textbf{D. Prudential Limitations}

Along with the constitutional standing requirements, courts often consider two prudential limitations on the court's ability to hear cases: (1) a plaintiff may not raise a third-party claim, and (2) a plaintiff may not raise a generalized grievance.\textsuperscript{166} The difference between the constitutional requirements and the prudential limitations is that the constitutional requirements must be met in every case, whereas Congress may overrule the prudential limitations.\textsuperscript{167} This difference lies in the fact that the prudential limitations are not based on constitutional requirements, but rather on "prudent judicial administration."\textsuperscript{168} The courts created these limitations because

\begin{quote}
[w]ithout such limitations — closely related to Art. III concerns but essentially matters of judicial self-governance — the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.\textsuperscript{169}
\end{quote}

Thus, courts created the prudential limitations in the interest of judicial economy, and they serve to limit cases that raise issues that would be better dealt with by one of the other branches of government.

Congress may grant a right to sue, either expressly or implicitly in a statute, to persons normally barred by prudential standing limitations.\textsuperscript{170} For example, in \textit{Federal Election Commission v. Akins},\textsuperscript{171} the Supreme Court found that the plaintiffs had standing based on a clause in the congressional statute on which the suit was based.\textsuperscript{172} The plaintiffs were a group of voters who contested the Federal Election Commission's (FEC) determination that the American Israel Public Affairs Committee (AIPAC) was not a political committee as defined

\textsuperscript{166} CHEMERINSKY I, supra note 76, at 54.
\textsuperscript{167} \textit{Id.}
\textsuperscript{168} \textit{Id.}
\textsuperscript{169} \textit{Id.}
\textsuperscript{170} \textit{Id.}
\textsuperscript{172} \textit{Id.} at 19.

https://digitalcommons.law.ou.edu/olr/vol56/iss3/6
by the Federal Election Campaign Act of 1971. The FEC claimed that the plaintiffs presented only a generalized grievance. However, the Federal Election Campaign Act of 1971 said that "[a]ny person who believes a violation of this Act ... has occurred, may file a complaint with the Commission," and further that "[a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party ... may file a petition in district court seeking review of that dismissal." The prudential limitation against generalized grievances would have barred such a suit, but Congress had expressly granted the right to sue. Thus, the plaintiffs had standing and the case proceeded.

1. Third-Party Claims

The first of the two prudential limitations prohibits third-party suits. The Court has stated that a plaintiff's claim must be based on his own legal rights and interests, not on those of a third party. There are two reasons for this limitation. First, it prevents unnecessary adjudication: "[I]t may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not." Second, it ensures that the plaintiff is the best party to litigate the claim: "[T]hird parties themselves usually will be the best proponents of their own rights. The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them." Thus, a plaintiff raising a third-party claim generally does not have standing.

An example of an improper third-party claim is found in Gilmore v. Utah. In Gilmore, a convicted murderer's mother sought a stay of execution despite her son's waiver of his right to appeal. The Supreme Court found that the mother lacked standing because there was no controversy between the state and the mother. Because the mother was raising the claim of a third party, the murderer, she did not have standing.

173. Id. at 13.
174. Id.
175. Id. at 23.
176. Id. at 19 (quoting 2 U.S.C. §§ 437g(a)(1), (a)(8)(A) (1994)) (alterations in original) (emphasis added).
179. Id. at 114.
181. Id. at 1013 (Burger, C.J., concurring).
182. Id. at 1016-17 (Burger, C.J., concurring).
There are exceptions to the third-party claims limitation. When the countervailing considerations outweigh the general reasons behind the limitation, the limitation is improper.\(^\text{183}\) Furthermore, the rule against third-party claims "should not be applied where its underlying justifications are absent."\(^\text{184}\) In *Craig v. Boren*,\(^\text{185}\) the Court held that "a decision by us to forgo consideration of the constitutional merits in order to await the initiation of a new challenge to the statute by injured third parties would be impermissibly to foster repetitive and time-consuming litigation under the guise of caution and prudence."\(^\text{186}\) Additionally, the principle does not apply to cases where a litigant suffers an actual injury despite not being a member of the class whose rights are being violated.\(^\text{187}\)

The Court generally considers two elements when deciding whether to apply the third-party claim limitation: (1) the relationship between the plaintiff and the person with the right, and (2) whether the person with the right is in a position to assert the right.\(^\text{188}\) Thus, the Court may allow a third-party claim when a litigant and the third party have such a relationship that the litigant may only engage in a particular activity if the third party has the right in question.\(^\text{189}\) For example, an abortion doctor may sue for a woman's right to have an abortion because the doctor's activities depend on the woman's rights.\(^\text{190}\)

The court may also allow a third-party claim when the affected party is unable to assert the right personally, such as when an organization asserts its members' right to anonymity, because the members are unable to assert that right themselves while maintaining it.\(^\text{191}\) An example is found in *Barrows v. Jackson*,\(^\text{192}\) wherein the court maintained the validity of the general rule against third-party claims while making an exception to this rule.\(^\text{193}\) In

\(^{183}\) Warth v. Seldin, 422 U.S. 490, 500-01 (1975).

\(^{184}\) Singleton, 428 U.S. at 114.

\(^{185}\) 429 U.S. 190 (1976). In *Craig*, a liquor vendor challenged the constitutionality of a state statute prohibiting the sale of beer to males under the age of twenty-one, but allowing the sale of beer to females over the age of eighteen. *Id.* at 192. The Court held that the vendor had standing, despite the fact that she was not the object of the government action, because she had suffered an actual economic injury as a result of the unconstitutional statute. *Id.* at 194.

\(^{186}\) *Id.* at 193-94.


\(^{188}\) Singleton, 428 U.S. at 114-16.

\(^{189}\) *Id.* at 114-15.

\(^{190}\) See *id.* at 115; see also *Craig*, 429 U.S. at 194 (allowing a litigant to raise a third-party claim based on the relationship between vendor and customer — the vendor suffered an injury when the customer was denied the right to purchase an item).


\(^{192}\) 346 U.S. 249 (1953).

\(^{193}\) *Id.* at 257.
Barrows, a homeowner was sued for allowing violation of a restrictive covenant disallowing the sale of realty to non-Caucasians. 194 As a defense, the homeowner claimed that it would be unconstitutional for the state court to rule in such a way as to enforce the covenant. 195 This was clearly a third-party claim, yet the Court held that because the affected parties were unable to raise the claim, an exception was appropriate. 196 When denying standing would cause a group's constitutional rights to be violated because the people possessing the right would not be able to assert those rights in court, the need to protect those constitutional rights outweighs the reasons underlying the rule against third-party claims. 197

2. Generalized Grievances

The second prudential limitation prohibits generalized grievances. A generalized grievance is one in which the impact on the plaintiff is exactly the same as the impact on all members of the public. 198 The Supreme Court has "consistently held that a plaintiff raising only a generally available grievance about government — claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large" should not be found to have standing. 199

There are exceptions, however. Indeed, "[t]o deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody." 200 Usually, the generalized grievance limitation is cited as a reason to deny standing in cases where the harm not only is widespread, but also is vague and poorly defined, such as damage to an interest in seeing the law followed. 201 However, if a plaintiff can overcome the actual injury requirement, it is likely that he can also overcome the generalized grievance limitation.

194. Id. at 251-52.
195. Id. at 254-55.
196. Id. at 257.
197. Id.
198. United States v. Richardson, 418 U.S. 166, 176-77 (1974) (per curiam) (the impact is "plainly undifferentiated and 'common to all members of the public'") (quoting Ex parte Levitt, 302 U.S. 633, 634 (1937)).
In summary, to have standing a plaintiff must allege (1) an injury (2) caused by the defendant that is (3) redressable by the court. Furthermore, the court may deny standing in cases involving third-party claims or generalized grievances. These requirements can be quite difficult to meet, and if a plaintiff cannot meet them, no justiciable claim exists. Therefore, as a first step in every potential litigation, every plaintiff must evaluate whether he has standing. This holds equally true for potential plaintiffs in a suit against a President for violation of the War Powers Resolution.

V. Who Has Standing to Sue a President for Violation of the War Powers Resolution?

There is perhaps an unlimited number of people who feel that they should be able to sue a President for violation of the War Powers Resolution, but only a handful whose claims could stand up to the most cursory assessment. Whether even those claims could stand up to more rigorous examination is another matter. Possible plaintiffs in a suit against a President for violating the Resolution include individual members of Congress, a majority of Congress suing together, an injured member of the public, and military personnel. Below is an analysis of each of these groups, and an attempt to predict whether the Court would, in fact, find that each has standing.

A. Individual Members of Congress

Congressional standing is an area in which the abundance of recent decisions dealing with the issue only modestly helps predict what the Supreme Court will do in a particular case — unless, of course, the facts are nearly identical to a previous case. An overview of these recent decisions and associated commentary reveals the controversial nature of congressional standing.202 Some commentators have suggested that courts should never find that members of Congress have standing when they are suing as legislators.203 Nonetheless, courts sometimes have granted standing to legislators, as in the D.C. Circuit case *Michel v. Anderson*.204 In *Michel*, several members of Congress, along with individual voters, challenged a rule of the House of Representatives allowing delegates from Puerto Rico, Guam, the Virgin Islands, American Samoa, and the District of Columbia to vote in the Committee of the Whole.205 In allowing the case, the *Michel* court held that

204. 14 F.3d 623 (D.C. Cir. 1994).
205. Id. at 624-25.
congressmen have "standing to assert that their voting power has been diluted."\textsuperscript{206} However, decisions since Michel have not been so liberal in their standing assessments.

One such case is Raines v. Byrd,\textsuperscript{207} in which six members of Congress claimed that the Line Item Veto was unconstitutional.\textsuperscript{208} The U.S. Supreme Court held that the members of Congress lacked standing to bring the suit, primarily because of a lack of a sufficient personal stake or concrete injury.\textsuperscript{209} The Court reasoned that:

First, appellees have not been singled out for specially unfavorable treatment as opposed to other Members of their respective bodies. Their claim is that the Act causes a type of institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress and both Houses of Congress equally. Second, appellees do not claim that they have been deprived of something to which they personally are entitled — such as their seats as Members of Congress after their constituents had elected them. Rather, appellees' claim of standing is based on a loss of political power, not loss of any private right, which would make the injury more concrete.\textsuperscript{210}

The Court held that Michel did not apply because the appellees were able to vote on the Act, and their votes were in no way diminished — they simply lost.\textsuperscript{211} Another factor in the Court's decision was the fact that Congress could prevent the use of the Line Item Veto in ways other than resorting to the judiciary, such as a "vote to repeal the Act, or to exempt a given appropriations bill (or a given provision in an appropriations bill) from the Act."\textsuperscript{212} After all, the Court stated, the judicial ruling of a Legislative or Executive act as unconstitutional "has been recognized as a tool of last resort on the part of the federal judiciary throughout its nearly 200 years of existence."\textsuperscript{213}

The D.C. Circuit Court applied the same reasoning in Chenoweth v. Clinton.\textsuperscript{214} In Chenoweth, four U.S. Representatives sued President Clinton,

\begin{itemize}
  \item \textsuperscript{206} Id. at 625.
  \item \textsuperscript{207} 521 U.S. 811 (1997).
  \item \textsuperscript{208} Id. at 814.
  \item \textsuperscript{209} Id. at 818, 830.
  \item \textsuperscript{210} Id. at 821 (citation omitted).
  \item \textsuperscript{211} Id. at 824.
  \item \textsuperscript{212} Id.
  \item \textsuperscript{214} 181 F.3d 112 (D.C. Cir. 1999).
\end{itemize}
claiming that his creation of the American Heritage Rivers Initiative (AHRI) by executive order was unconstitutional. They based their standing argument on "the deprivation of their right as Members of the Congress to vote on (or, more precisely, against) the AHRI." The court found their stated basis to be insufficient, based on the Raines precedent.

The most recent congressional standing case, and the most important to the analysis of whether a member of Congress has standing to sue a President for violating the War Powers Resolution, is Campbell v. Clinton. In Campbell, a number of Congressmen sued President Clinton for violating the War Powers Resolution and the War Powers Clause of the Constitution by sending troops to Yugoslavia to join a NATO campaign. The U.S. Court of Appeals for the D.C. Circuit held that the Congressmen lacked standing. The court reasoned that the claim that the President acted illegally did not constitute a nullification of a congressional vote. The court found that the members of Congress still could have exercised legislative power to stop the war if they had so chosen. The court suggested that:

[i]n this case, Congress certainly could have passed a law forbidding the use of U.S. forces in the Yugoslav campaign; indeed, there was a measure . . . introduced to require the President to withdraw U.S. troops. . . . However, . . . this measure was defeated by a 139 to 290 vote. Of course, Congress always retains appropriations authority and could have cut off funds for the American role in the conflict. Again there was an effort to do so but it failed . . . . And there always remains the possibility of impeachment should a President act in disregard of Congress' authority on these matters.

Commentators have criticized the Campbell decision, but it is the

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215. Id. at 112.
216. Id. at 113.
217. Id. at 115.
219. Id.
220. Id. at 22.
221. Id. at 23.
222. Id.
223. See Michael Hahn, Note, The Conflict in Kosovo: A Constitutional War?, 89 GEO. L.J. 2351, 2381-86 (2001) ("Justice Scalia and Judge Bork . . . have argued that standing should not be conferred on congressional plaintiffs because doing so would allow an unelected judiciary to encroach on the prerogatives of the other two branches of government . . . . [However, this] view is problematic because it eliminates the role of the judiciary in checking the power of the Executive — a role envisioned by the Framers." (citations omitted)).
currently prevailing precedent in the D.C. Circuit, which is an appropriate jurisdiction for a lawsuit by a member of Congress against a President for violation of the War Powers Resolution. This is one of those rare situations in which it should be easy to predict what that court will do if a future suit is filed because there is a recent, almost identical case. On the other hand, the plaintiffs in Campbell, Chenoweth, and Raines probably thought that their cases were easily predictable because each argued a slight variation on the claim deemed adequate in Michel — that their voting power had been diluted. It is not a substantial leap to assume that if dilution of voting power is a sufficient injury, complete denial of voting power must be even more adequate. The D.C. Circuit, at least, has ruled otherwise. Campbell came only six years after Michel. It is therefore unclear what courts will decide the next time this issue arises. For the time being, it appears that a member of Congress does not have standing to sue a President for violating the War Powers Resolution.

B. A Majority of Congress

In each of the cases in which an individual member of Congress was not granted standing, the courts pointed out that the plaintiff was not in the majority. This leads to a natural question: Does a majority of Congress together have standing to sue a President for violating the War Powers Resolution? There certainly appears to be precedent for an affirmative answer. In Coleman v. Miller, the plaintiffs were twenty state senators who challenged the ability of the Kansas Lieutenant Governor to cast a tie-breaking vote in favor of ratification of a proposed constitutional amendment, claiming their votes against ratification had "been overridden and virtually held for naught although if they [had been] right in their contentions their votes would have been sufficient to defeat ratification." The Court held that "these senators ha[d] a plain, direct and adequate interest in maintaining the effectiveness of their votes." An analogous situation would occur if a majority of Congress were to vote against war, and a President waged war anyway. In such a situation, that majority would also have a "plain, direct and adequate interest" in their votes, and standing would be appropriate.

In fact, this solution was proposed by the D.C. District Court in Dellums v. Bush, in which fifty-three members of the House of Representatives and one

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226. Id. at 438.
227. Id.
U.S. Senator requested an injunction to prevent President George H.W. Bush from initiating a military attack against Iraq prior to obtaining congressional approval, as mandated by the War Powers Resolution and the Constitution. The suit was filed on November 19, 1990, on the premise that the President was about to wage war, which allegedly would be unconstitutional without congressional approval, and which would “deprive the congressional plaintiffs of the voice to which they are entitled under the Constitution.”

The Dellums court first addressed the issue of injury. The plaintiffs claimed that they were in imminent danger of injury to their constitutionally guaranteed power to declare war. The court reasoned that this claim “state[d] a legally-cognizable injury, for . . . members of Congress plainly have an interest in protecting their right to vote on matters entrusted to their respective chambers by the Constitution.” The court also addressed the argument that the Constitution only gives Congress the power to declare war, not avoid it:

If the War Clause is to have its normal meaning, [the Constitution] excludes from the power to declare war all branches other than the Congress. It also follows that if the Congress decides that United States forces should not be employed in foreign hostilities, and if the Executive does not of its own volition abandon participation in such hostilities, action by the courts would appear to be the only available means to break the deadlock in favor of the constitutional provision.

Thus, the court concluded that the plaintiffs had met the requirement of injury in fact. Furthermore, the court concluded that “in principle, an injunction may issue at the request of Members of Congress to prevent the conduct of a war which is about to be carried on without congressional authorization.”

Although the plaintiffs had standing, the Dellums court ultimately decided the issue was nonjusticiable because it lacked ripeness. The court used the ripeness test announced in Goldwater v. Carter: “[A] dispute between

229. Id. at 1143.
231. U.S. CONST. art. I, § 8, cl. 11.
233. Id. at 1147.
234. Id.
235. Id. at 1144 n.5.
236. Id. at 1148.
237. Id. at 1149.
Congress and the President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority."239 In this case, Congress had not voted, so the case was not ripe. The Court stated that

[i]t would be both premature and presumptuous for the Court to render a decision on the issue of whether a declaration of war is required at this time or in the near future when the Congress itself has provided no indication whether it deems such a declaration either necessary, on the one hand, or imprudent, on the other.240

The court recognized that even if Congress issued a joint resolution against war, the President would probably ignore it "if he is persuaded that the Constitution affirmatively gives him the power to act otherwise,"241 but Congress was required to make the effort before resorting to a judicial solution.

The Dellums court pointed out that the problems surrounding congressional suits "are avoided by a requirement that the plaintiffs in an action of this kind be or represent a majority of the Members of the Congress," because Congress as an institution is the only body able to exert its institutional power.242 Consequently, it may be argued that if a majority of Congress were to sue after a congressional vote that the President disregards, the courts would grant that majority standing.

The Supreme Court has said as much in dicta in other cases. In Raines, the Court stated that, based on the Coleman holding, "legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified."243 Applying this reasoning, if a majority of either the Senate or the House of Representatives were to challenge a President’s deployment of troops without following the requirements of the War Powers Resolution, it would probably be deemed to have standing. This is because such a majority would have had enough voting power to prevent the President’s action if the deployment had not prevented that vote.244

A final important point concerns another factor the Court has considered in recent congressional standing cases: the availability of other courses of

239. Id. at 997.
240. Dellums, 752 F. Supp. at 1149-50 (citation omitted).
241. Id. at 1149.
242. Id. at 1151. "[I]t is only if the majority of the Congress seeks relief from an infringement on its constitutional war-declaration power that it may be entitled to receive it.” Id.
244. Entin, supra note 202, at 1309.
action. However, in practical terms, before a majority of Congress would ever collectively sue a President, it probably would have already exhausted other courses of action, coming to the judiciary as a last resort. For example, the majority could be in the process of impeaching the President but would want to get an injunction against deployment in the meantime because impeachment can be a lengthy process. This would especially be true if the military action is particularly distasteful and calls for a rapid withdrawal of troops. Because it is unlikely that a majority of Congress would resort to the judiciary before trying other courses of action, it is unlikely the Court would have that objection. Nonetheless, if a majority of Congress were to decide to sue, it should first consider whether other options exist. If the members do so, case law indicates that a majority of Congress would have standing to sue a President for violation of the War Powers Resolution.

C. Members of the Public

The greatest obstacle a member of the general public would need to overcome in the area of standing to sue a President for violation of the War Powers Resolution is the prudential limitation against generalized grievances. As discussed in Part IV.D.2, this limitation prevents suits where a plaintiff’s injury is common to all citizens or all taxpayers and is founded only on an interest in seeing the government follow the law. Therefore, if a member of the public trying to sue a President for violation of the War Powers Resolution claimed that his injury was based on his interest in seeing the law followed, the court may decide not to grant standing because every citizen has suffered that same injury.

Prohibiting generalized grievance claims is especially important when it concerns the actions of the government. The Supreme Court has stated that

> [p]roper regard for the complex nature of our constitutional structure requires neither that the Judicial Branch shrink from a confrontation with the other two coequal branches of the Federal Government, nor that it hospitably accept for adjudication claims of constitutional violation by other branches of government where the claimant has not suffered cognizable injury.

Because a lawsuit accusing a President of violating the War Powers Resolution definitely constitutes a confrontation with another branch of government, the Court must be especially certain that the plaintiff has a

245. CHEMERINSKY 1, supra note 76, at 58.

sufficient injury, and it is more likely to apply this prudential limitation.

However, the prohibition against generalized grievances is only a prudential limitation, not a constitutional requirement, and thus is not an absolute bar for standing. It is rare for a plaintiff to allege an injury shared by many and nevertheless be granted standing, but it can be done. The Supreme Court recently said, "Often the fact that an interest is abstract and the fact that it is widely shared go hand in hand. But their association is not invariable, and where a harm is concrete, though widely shared, the Court has found 'injury in fact.'"247 The Court further stated that "the fact that [an injury] is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts."248 Thus, it is possible to have standing when a suit is based on an actual injury, even though the injury is widespread.

The Court recognized this possibility in Flast v. Cohen, when it allowed a suit by a taxpayer alleging that a federal taxing and spending program was unconstitutional.249 The Court reasoned that whether a particular taxpayer has a sufficient personal stake in the outcome depends on the facts of that case.250 Furthermore, the court in Michel v. Anderson recognized that individual voters have standing to assert that the votes of their elected representatives have been diluted.251 The Michel court reasoned that "[i]t could not be argued seriously that voters would not have an injury if their congressman was not permitted to vote at all on the House floor."252 In both of these cases, the fact that all of the taxpayers and all of the voters suffered the same injury was not dispositive. Although the injury was widespread, it was nevertheless an injury.

The determining factor for standing appears to be the type of injury alleged. In both Flast and Michel, the plaintiff suffered a definite injury, one which could almost be quantified, whereas an interest in seeing the President follow the law seems to be an abstract injury at best. For an illustration, contrast the Line Item Veto cases. In Raines v. Byrd, members of Congress claimed the Line Item Veto was unconstitutional and alleged that they suffered a loss of political power.253 The Court deemed this injury too abstract and denied standing.254 In Clinton v. City of New York,255 the plaintiffs made exactly the
same claim, but based their claim on actual economic loss suffered as a result of the use of the Line Item Veto on portions of the Balanced Budget Act of 1997 and the Taxpayer Relief Act of 1997. This injury was just as widespread as the injury alleged in Raines, yet the Court found standing. This was because "the parties ... alleged a 'personal stake' in having an actual injury redressed rather than an 'institutional injury' that is 'abstract and widely dispersed.'" Therefore, the deciding factor was not the number of people who suffered the alleged injury, but rather the injury's nature.

A plaintiff suing a President for violation of the War Powers Resolution therefore must define his injury as concrete and personal, despite its widespread nature. Optimally, the injury should be quantifiable as well. Certainly, the injury must be traceable to the war, although it would not be necessary to allege that forcing the President to comply with the War Powers Resolution would end the war, based on the precedent of Lujan v. Defenders of Wildlife. The plaintiff would also need to point out the relationship with his members of Congress to avoid the prohibition against third-party claims, based on the precedent of Michel v. Anderson.

The plaintiff possibly could allege that his taxes are funding an unconstitutional war, in which case the plaintiff could refer the Court to its decision in Flast. Another possible claim could be an economic loss as a result of a bad wartime economy or because of social unrest if the war is particularly unpopular and rioting ensues, resulting in damage to property or people. A plaintiff could also allege actual physical injury if the war brought attacks to U.S. soil, although even these may not be adequate because, based on the precedent of City of Los Angeles v. Lyons, the Court could hold that the low likelihood of further injury makes the existing injury insufficient. Ultimately, it is likely that if the alleged injury is concrete and personal, a member of the general public would have standing to sue a President for violation of the War Powers Resolution.

D. Military Personnel

Standing is based primarily on injury. All of the Constitutional requirements revolve around the injury alleged, as do the prudential limitations against generalized grievances and third-party claims. Arguably,
those who suffer the most injury in a war are military personnel. Thus, one would assume that military personnel would have standing to sue a President for violation of the War Powers Resolution.

No Supreme Court precedent exists for such a decision, so a full standing analysis should be undertaken to discover if such an assumption is valid. Injury would not be a difficult requirement to satisfy. Military personnel are always injured in war, both physically and emotionally. They are often financially injured as well by missing work, rehabilitation following injury or trauma, or through the loss of business or educational opportunities, particularly if they were drafted, as opposed to career military.

The second requirement is causation, which would also be easy to satisfy. War causes injuries to military personnel, and would be fairly traceable to the President’s violation of the War Powers Resolution. The precedent of the relaxed causation requirements from *Lujan v. Defenders of Wildlife* applies, so the plaintiff need not allege that there would be no war if the President had complied with the War Powers Resolution. Likewise, the plaintiff does not need to allege that forcing compliance would end the war, so redressability would be satisfied as well.

The next consideration is the prudential limitation against third-party claims, because Congress actually possesses the right to declare war, not military personnel. However, one of the exceptions seems to apply in such a situation: military personnel benefit from Congress’ right to declare war, and they cannot benefit from a right that Congress cannot exercise. Thus, based on the precedent of *Craig v. Boren*, the third-party claims limitation would not apply. The prudential limitation against generalized grievances likewise would not apply because the plaintiff suffers a concrete, personal injury, demonstrated by the precedent of *Flast, Michel*, and *Clinton*.

Therefore, a court could decide that military personnel have standing to sue a President for violation of the War Powers Resolution under a strict standing analysis. However, it is unlikely that any member of the military would ever file such a suit. After all, “there are powerful disincentives for members of the armed forces to bring such a lawsuit: career officers would risk sacrificing their careers, while enlisted personnel would be challenging authority in ways that are fundamentally inconsistent with the values and ethos promoted by

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injury alleged since it has been demonstrated that a plaintiff who is not the subject of a governmental action, but who is nonetheless injured, may have standing despite the prohibition against third-party claims. *See* discussion *supra* Part IV.D.

261. *Lujan*, 504 U.S. at 572 n.7.
their training and indoctrination." 262 But that does not mean it could never happen; "a lawsuit requires only one plaintiff." 263

**VI. Political Question Doctrine**

A court would probably hold that a majority of Congress suing jointly, personally injured members of the public, and military personnel would have standing to sue a President for violation of the War Powers Resolution. However, the court may nevertheless decline to hear the case if it finds that the case is otherwise nonjusticiable. If a court finds that the plaintiffs have standing, then it is not likely to find that the case is not ripe or moot. As discussed in Part IV.A, a case that is not ripe often lacks the injury requirement, and a moot case is often considered unredressable. However, sometimes a plaintiff has standing, yet the case violates the political question doctrine, a well-established component of justiciability.

The U.S. Supreme Court has stated that "a party may have standing in a particular case, but the federal court may nevertheless decline to pass on the merits of the case because . . . it presents a political question." 264 This occurs because "[t]he question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government." 265 In other words, the mere fact that a party has standing does not mean that there is not a political question. However, the political question doctrine is "sensitive and complex," and so courts usually "turn initially, although not invariably, to the question of standing to sue." 266 Therefore, many cases that violate the political question doctrine never address the political question problem because the party is first found not to have standing.

It should be noted that a political question differs from a political issue. The court may decide questions dealing with political issues. 267 The political question doctrine is founded on "the separation of powers and the inherent limits of judicial abilities," 268 and on the idea that some issues are committed to Congress or the President, and thus are not justiciable. 269 The Court has

262. Entin, supra note 202, at 1310.
263. Id.
265. Id.
269. DANIEL A. FARBER ET AL., CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S
repeatedly stressed that the judiciary does not have "unconditioned authority to determine the constitutionality of legislative or executive acts."\textsuperscript{270} In \textit{Flast}, the Court noted that "no justiciable controversy is presented when the parties seek adjudication of only a political question."\textsuperscript{271} In \textit{Lujan}, the Court further stated that "[v]indicating the public interest . . . is the function of Congress and the Chief Executive."\textsuperscript{272} 

In \textit{United States v. Richardson},\textsuperscript{273} the Court commented on complaints about justiciability issues:

\begin{quote}
[a]ny other conclusion [than requiring application of the political question doctrine] would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts. The Constitution created a \textit{representative} Government with the representatives directly responsible to their constituents at stated periods of two, four, and six years; that the Constitution does not afford a judicial remedy does not, of course, completely disable the citizen who is not satisfied with the [actions of the government] . . . . Slow, cumbersome, and unresponsive though the traditional electoral process may be thought at times, our system provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them.\textsuperscript{274}
\end{quote}

Thus, the political question doctrine is an integral part of the democratic system of government.

The political question doctrine is defined as "[t]he judicial principle that a court should refuse to decide an issue involving the exercise of discretionary power by the executive or legislative branch of government."\textsuperscript{275} As noted above, there is a difference between a political question and a political issue.\textsuperscript{276} For example, "[w]hile the Constitution grants to the political
branches, and in particular to the Executive, responsibility for conducting the
nation's foreign affairs, it does not follow that the judicial power is excluded
from the resolution of cases merely because they may touch upon such
affairs."277 Rather, it is excluded only from deciding cases pertaining to
judgment calls by elected officials. In fact, the Court has stated that deciding
whether one of the branches of government has overstepped its constitutional
authority is "a delicate exercise in constitutional interpretation, and is a
responsibility of this Court as ultimate interpreter of the Constitution."278

The primary factor in deciding whether a case violates the political question
doctrine seems to be whether the case involves a constitutional right.279 For
example, if someone sued Congress for voting to raise taxes, the case would
violate the political question doctrine. Raising taxes is a discretionary
function of Congress. On the other hand, if someone sued Congress for
raising taxes without first presenting it to the President, the case would not
violate the political question doctrine. The Constitution states that "[a]ll Bills
for raising Revenue . . . shall, before it becomes a Law, be presented to the
President . . . ."280 Therefore, presenting a bill to the President is not
discretionary, and the judiciary may decide the case.

It logically follows that if someone sues the President for deciding to go to
war, the case would violate the political question doctrine, because that
decision is discretionary. However, if someone sues the President for going
to war without first asking Congress, the case would not violate the political
question doctrine because the War Powers Resolution, which is based on
Congress' constitutional power to declare war, mandates that the President
must do so. This is an instance where it is a political issue, but not a political
question. Whether to go to war is a political question; following the
delegation of each branch's constitutional powers is not. Therefore, if a
plaintiff were deemed to have standing to sue a President for violation of the
War Powers Resolution, it is unlikely that the court would deem the case
otherwise nonjusticiable for violating the political question doctrine.

VII. Conclusion

The Legislative and Executive branches have opposing views as to who
holds the power to do what regarding war. The Judicial branch has a duty to
resolve this constitutional dilemma. There have been prior cases involving the
war powers, but the plaintiff has never been the correct person to raise the

278. Baker, 369 U.S. at 211.
279. Id.
claim. At some point in the future, the proper plaintiff will raise the claim, and the judiciary will finally be able to settle the question of which branch holds the war powers.

The case that settles the question likely will be predicated on a President’s violation of the War Powers Resolution. A determination of the constitutionality of the Resolution will essentially define war in the context of Congress’ power to declare war. The party to bring the suit to court for adjudication could be a majority of Congress suing jointly, a personally injured member of the public, or military personnel, because each of these three groups would have standing to sue the President for violation of the War Powers Resolution. Therefore, it is possible, and in fact probable, that a case will arise that will require the Court to finally resolve the tension between Congress and the President regarding the war powers.

_Cassandra L. Wilkinson_